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VIVAMALL SDN BHD & ORS

v.

TDC CONSTRUCTION SDN BHD & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
ZABARIAH MOHD YUSOF J
[SUIT NO: 22NCVC-871-07-2012]
8 NOVEMBER 2012

C ***CIVIL PROCEDURE:*** *Injunction - Application for - Injunction to restrain party from approaching, interfering with or harassing another - Whether applicants showed real risk of continued harassment - Whether applicant justified in being fearful for safety - Damages - Whether appropriate remedy - Whether defendants prejudiced by restraining order*

D ***TORT:*** *Nuisance - Harassment - Appointment of contractor to carry out refurbishment project - Failure of contractor to complete project - Replacement of contractor - Demand of sum by contractor for works done - Harassment and intimidation for payment - Threats made via telephone calls, SMS and by showing up in groups at home and office -*
E *Application for injunction to restrain party from approaching, interfering with or harassing another - Whether applicant showed real risk of continued harassment - Whether applicant justified in being fearful for safety - Whether defendants prejudiced by restraining order*

F The plaintiffs brought the instant action against the defendants for causing them nuisance and harassment over an alleged debt due to the defendants for work done on a project. The first plaintiff ('Vivamall') had appointed the first defendant ('TDC') as a contractor to carry out refurbishment of a shopping mall. When
G TDC failed to complete the project on time, Vivamall then replaced it with another contractor. TDC demanded that it be paid for work done but Vivamall did not agree to the sum demanded and referred the dispute to arbitration. It was Vivamall's case that when negotiations to settle the matter failed,
H the defendants (the second defendant was TDC's shareholder and director while the third defendant was its purported representative) began to harass and intimidate the plaintiffs (the second plaintiff was Vivamall's shareholder and director while the third plaintiff was its project manager) for payment. It was alleged
I that the defendants made various threats to the plaintiffs, made numerous telephone calls to them, sent SMSes and even came in

groups with other persons to see the second plaintiff at his home and office. The plaintiffs filed an application for injunction to restrain the defendants from approaching, interfering with and harassing them and their families pending the disposal of the suit and the arbitration proceedings.

Held (allowing application with costs):

(1) Taking into account all that had happened, including the video CD and photographs tendered as exhibits, the court found that there was a real risk that the defendants were likely to continue harassing or disturbing the plaintiffs pending the arbitration proceedings if a restraining order was not granted. The plaintiffs were justified in being fearful for their safety. (para 48)

(2) Compared to the evidence of the defendants, which was a bare denial as to what happened, the plaintiffs successfully showed that there were real risks involved and their fear was far from being imaginary. (para 49)

(3) Damages were not an adequate remedy as the plaintiffs would not be adequately compensated for any physical harm or mental anguish they might have to endure pending the determination of the suit. (para 61)

(4) The defendants would not be prejudiced if a restraining order was granted as they would only have to distance themselves 500 meters away from the plaintiffs. That condition, however, did not apply when the parties met in court or for arbitration. (paras 52, 56 & 57)

Case(s) referred to:

London Borough Islington v. Margaret Elliot, Peter Moris [2012] EWCA Civ 56

Meidi (M) Sdn Bhd v. Meidi-ya Co Ltd Japan & Anor [2008] 1 CLJ 46 CA

Redland Bricks Ltd v. Morris and Another [1969] 2 AER 576

For the plaintiffs - Justin Voon (Alvin Lai with him); M/s Justin Voon Chooi & Wing

For the defendants - CK Oon (Nik Ahmed Asraf & Ivan Foong with him); M/s CK Oon & Co

Reported by Ashok Kumar

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JUDGMENT

Zabariah Mohd Yusof J:

[1] Enclosure 4 is the application by the plaintiff for an injunction to restrain the defendants from approaching, interfering and harassing the plaintiffs and their family members physically and mentally pending the disposal of the main suit.

Background

[2] The first plaintiff appointed the first defendant as a contractor for a project known as "Proposed refurnishment of UE 3 Shopping Mall on Part of Lot PT 44, Section 19A, Jalan Loke Yew, KL" *vide* a letter of award dated 28 August 2009.

[3] The second plaintiff is the shareholder and director of the first plaintiff. The third plaintiff is the project manager of the first plaintiff.

[4] The second defendant is the shareholder and director of the first defendant. The third defendant is the purported representative of the first defendant.

[5] There were some problems in respect of the project and disputes between the first defendant and the first plaintiff, in which the first plaintiff had referred the matter to arbitration which is now pending.

[6] According to the plaintiffs, the said project must be completed by the defendants on 2 September 2010, however they failed to do so resulting in the plaintiffs having to appoint another contractor.

[7] Subsequently, the first defendant *vide* letter dated 28 March 2012 demanded from the first plaintiff the outstanding amount due in respect of the project in which the first plaintiff disputes. Hence the first plaintiff issued an arbitration notice dated 20 July 2012 to first defendant.

[8] The plaintiff's claim herein is not for the project. However the plaintiff's relief herein are with regard to the nuisance and harassment by the defendants as a result of the plaintiffs not paying the alleged debt which is due to the works done by the defendants in the project.

[9] On or about June 2012 the parties started to negotiate in respect of payment for the project, but the negotiations/meetings were unsuccessful. The plaintiffs claimed that there were some quarrel between the representatives of the first plaintiff and the first defendant.

[10] It was alleged by the plaintiffs that during the meeting the second defendant and third defendant uttered some threatening words against the third plaintiff and the first plaintiff employees which was recorded in the form of video CD (exh. B4 of encl. 5).

[11] It was alleged by the plaintiffs in its affidavit in support in encl. 5 that in the meeting of 6 July 2012 the second defendant had uttered the following words:

> You want to pay or don't want to pay? My friend here (referring to the third defendant) is running out of patience.

[12] The third defendant also uttered the following words loudly (in Mandarin which had been translated to the Bahasa Melayu):

> … Saya tiada masa. Kamu bayar atau tidak? Cakap sahaja.
>
> … Kamu sudah lebih, Teo, benar-benar terlalu lebih. Jika dalam kongsi gelap dan kamu menikam orang, kamu adalah seorang penderhaka, kamu faham? Jikalau di kongsi gelap, kamu akan terus lenyap. Kamu tidak boleh buat macam ini, kamu tahu! Orang datang untuk dapat wang, kamu menikam orang (dalam nada yang kuat dan diikuti dengan tepukan tangan tiga kali yang kuat).

[13] The third plaintiff had lodged a police report dated 6 July 2012 (exh. B5 of encl. 5) in respect of the incident which transpired during the meeting held on 6 July 2012 because the third plaintiff feared for his safety due to the threatening words uttered by the second defendant and third defendant.

[14] The matter was referred to the Magistrate. An inquiry was held on 13 August 2012 and the findings of the Magistrate was that there were criminal elements involved and hence the matter was referred to the police for further investigation under "ugutan jenayah".

[15] Further it was also averred that the second defendant continued to harass the second plaintiff with several phone calls, SMSes and also visit at the second plaintiff's house. It was stated that there was about 20-30 calls per day on 16 July 2012 until 19 July 2012.

[16] There were also SMSes received by the second plaintiff from the second defendant who demanded for payment from the second plaintiff. The second plaintiff had replied to the SMSes by stating that:

> Yr threaten our project using gangster. We made police report. Now we have to settle the arbitration or court. No need to meet.

[17] At about 11am on 19 July 2012, the second defendant brought along few persons to the second plaintiff's house and insisted to see the second plaintiff for payment. This was shown by the photographs in exh. B6 in encl. 5.

[18] Although the second defendant knew that the plaintiffs are disputing the first defendant's claim, and the matter is going for arbitration, the second defendant was still very persistent to see the second plaintiff (the shareholder and director of the first plaintiff).

[19] At about 3pm on 19 July 2012, the second defendant brought along several persons with him to the first plaintiff's office without any prior appointment.

[20] At the office the second defendant insisted to see the second plaintiff and acted in a rude manner in an attempt to harass and threaten the plaintiffs for payment. These were shown by the plaintiffs *vide* photographs at exh. B7 in encl. 5.

[21] The plaintiff also alleged that the defendants said that they will come back "in another way" if the plaintiffs refused to see them for payment.

[22] Three police reports were lodged by Mohd Shahril bin Jamaluddin, Muhammad bin Ishak (the second plaintiff's bodyguard) and the second plaintiff (exh. B8, B9 and B10 in encl. 5).

[23] From the abovementioned incidents, the plaintiffs felt insecure and at real risk.

[24] The plaintiffs in this action sought injunctive reliefs *inter alia* that the defendants are restrained from approaching, interfering, contacting and harassing the plaintiffs and their family members for payment and to preserve the *status quo* pending disposal of the suit and the arbitration proceedings between the first plaintiff and the first defendant.

The Courts Findings

[25] From the submissions of both parties it is not disputed that there are serious issues to be tried ie, issues of nuisance, harassment, disturbance and trespass by the defendants. The fact that the defendants deny that certain words were uttered only fortifies the seriousness of the issues. Hence I need not go further into this ingredient of the requirement of an injunction.

[26] It is trite law that a *quia timet* injunction will only be granted if the plaintiff can show that the defendant will do something that will cause irreparable harm to the plaintiffs.

[27] The defendant submitted that there were no threats and trespass committed by the defendants which justifies the application for the interim injunction. The judgment of Lord Upjohn in the case of *Redland Bricks Ltd v. Morris and Another* [1969] 2 AER 576 was cited by the defendant at p. 579 which stated that:

> … *quia timet* actions are broadly applicable to two types of cases. First, where the defendant has as yet done no hurt to the plaintiff but is threatening and intending (so the plaintiff alleges) to do works which will render irreparable harm to him or his property if carried to completion. Your Lordships are not concerned with that and those cases are normally, though not exclusively, concerned with negative injunctions. Secondly, the type of cases where the plaintiff has been fully recompensed both at law and in equity for the damages he has suffered but where he alleges that the earlier actions of the defendant may lead to future causes of actions … It is in this field that the undoubted jurisdiction, that is **an injunction ordering the defendant to carry our positive works**, finds its main expression, though of course it is equally applicable to many other cases. (emphasis added)

[28] Further in the case of *London Borough Islington v. Margaret Elliot, Peter Moris* [2012] EWCA Civ 56 Patten LJ held as follows at para. 31:

> More recently in *Lloyds v. Symonds* [1998] EWCA Civ 511 (a case involving nuisance caused by noise) Chadwick LJ said that:
>
> > On the basis of the judge's finding that the previous nuisance had ceased at the end of May 1996 the injunction which he granted on 7 January 1997 was *quia timet*. It was an injunction granted, not to restrain anything that the defendants were doing (then or at the commencement of the proceedings on 20th June 1996), but to restrain something which (as the plaintiff alleged) they were threatening or intending to do. Such injunction should not, ordinarily, be granted unless the plaintiff can show a **strong probability** that, unless restrained, the defendant will do something which will cause the plaintiff irreparable harm-that is to say harm which, if occurs, cannot be reversed or restrained by an immediate interlocutory injunction and cannot be adequately compensated by an award for damages. There will be cases in which the court can be satisfied that, if the defendant does what he is threatening to do, there is so strong a probability of an actionable nuisance that it is proper to restrain the act in advance rather than leave the plaintiff to seek an immediate injunction once the nuisance commenced. (emphasis added)

[29] The defendants submitted that as for the telephone calls and the SMSes, from the contents of the SMSes there cannot be any harassment nor threat. It was just a plea for a debt to be paid.

[30] As far as the meetings which were referred to by the plaintiff, the defendant submitted that there is no evidence at all that the second defendant ever raised his voice. The very factual basis for which the plaintiff is seeking need not be entertained. More so the very test for which the court need to consider is that the plaintiff must show irreparable harm would be sustained before such injunctive reliefs of this nature should be granted. According to the defendant, the series of phone calls and SMSes in our case were very diplomatic. There is no prolix of letters nor SMSes in the present cases. There is only one single SMS between the second defendant and the second plaintiff. There are no letters or SMS from the third defendant.

[31] On this issue of whether the plaintiff has to prove that there was a strong probability that, unless restrained, the defendant will do something which will cause the plaintiff irreparable harm. I am of the view that care must be taken in applying what has been said in the case of *London Borough Islington v. Margaret Elliot, Peter Moris* where it is stated that "such injunction should not, ordinarily, be granted unless the plaintiff can show a strong probability that, unless restrained, the defendant will do something which will cause the plaintiff irreparable harm". In that case it had been the judge's finding that the previous nuisance had ceased at the end of May 1996. Hence the injunction which was granted by the judge on 7 January 1997 was *quia timet*. The injunction was granted, not to restrain anything that the defendants were doing (then or at the commencement of the proceedings on 20 June 1996), but to restrain something which (as the plaintiff alleged) they were threatening or intending to do. Hence the court in *London Borough Islington v. Margaret Elliot, Peter Moris* stated that "such injunction (which is to restrain something which (as the plaintiff alleged) the defendants were threatening or intending to do) should not, ordinarily, be granted unless the plaintiff can show a strong probability that, unless restrained, the defendant will do something which will cause the plaintiff irreparable harm".

[32] As far as our local authority is concerned the Court of Appeal in the case of *Meidi (M) Sdn Bhd v. Meidi-ya Co Ltd Japan & Anor* [2008] 1 CLJ 46 at p. 70 stated that the test is "real risk" not "strong possibility".

[33] In addition it should be noted that there are two classes of injunctions ie, a mandatory injunction and a prohibitory one. A mandatory injunction requires a higher threshold to be proven for it to be granted. The case of *Redland Bricks Ltd v. Morris and Another* cited by the defendant is a case of a mandatory injunction.

[34] As far as our present case is concerned, the application is for a prohibitory injunction. Now the issue to be determined is whether there is a real risk that the defendants will harass and threaten the plaintiff before the disposal of the suit.

[35] The facts shows that the dispute between the first plaintiff and the first defendant is with regards to an alleged debt not made by the plaintiff for works done by the first defendant. These are matters which would be before an arbitrator.

[36] It started with a meeting at Old Town Café restaurant where the plaintiffs and the defendants met to discuss about the alleged payment when the defendants brought in several people to the said meeting.

[37] Then there was another meeting/discussion on 21 June 2012 between the plaintiffs and the defendants at the plaintiff's office where there was no settlement.

[38] Then another meeting on 6 July 2012 where there were some exchange of words as stated in encl. 5. The meeting also ended without any resolution.

[39] Subsequently, two weeks before the filing of the affidavit in support in encl. 5 (which was filed on 23 July 2012), the second plaintiff was disturbed by telephone calls, SMSes and visits by representatives of the first, second and the third defendants who the plaintiff alleged have threatened him.

[40] It was also averred in para. 10(r) of encl. 5 that, at or around 16 July 2012, the second plaintiff received numerous calls (about 20-30 times) from two numbers of which it was from the third defendant. The same also happened consecutively on 17 July 2012, 18 July 2012 and 19 July 2012 whereby the second plaintiff received numerous SMSes which threatened him to make payment which he undertake to produce later upon receiving from Maxis.

[41] The earlier SMS are in para. 10(q) of encl. 5.

[42] Then on 19 July 2012 at about 11am the second defendant, his wife together with several men including the third defendant came in a Toyota Vellfire to the house of the second plaintiff. They insisted to see the second plaintiff although the personal bodyguard of the second plaintiff refused to allow them to do so. After failing to see the second plaintiff at his house in the morning, the defendants subsequently informed the second plaintiff that that they will present themselves again at the second plaintiff's office on 19 July 2012 in the evening.

[43] At 3pm on the same day the first defendant came with four other Chinese men and one lady to the plaintiff's office and insisted to see the second plaintiff. The plaintiff alleged that the defendants have trespassed into the plaintiff's office. At para. 10(w) of encl. 5 the plaintiff averred that:

Tanpa apa-apa kebenaran diberi oleh plaintif-plaintif, defendan-defendan dan wakil mereka telah mencerobohi pejabat plaintif-plaintif dan menggangu perniagaan plaintif pertama, bercakap secara kasar dan mengeluarkan amaran-amaran berbentuk ugutan bahawa mereka akan datang balik lagi "dalam cara lain" jika saya tidak berjumpa mereka.

[44] These abovementioned are the events which the plaintiffs alleged have caused the plaintiffs to be fearful.

[45] I am of the view that the numerous telephone calls and the SMSes from the defendants amount to a continuing harassment. In addition the defendants together with other men also present themselves at the second plaintiff's house and later at the office of the second plaintiff when they failed to see the second plaintiff at his house. All this was done in their effort to make the plaintiff pay for their alleged debt.

[46] It is also to be noted that even at the earlier meetings the second defendant brought in other men to "discuss" the alleged debt. Why the necessity to bring in so many men if the intention is just to discuss a debt diplomatically.

[47] Similarly why the necessity of making several phone calls and SMSes and also the visit to the house and repeated it at the office on the same day on 19 July 2012. All these, together with the police reports lodged and the inquiry by the Magistrate, does it not show that the defendants were harassing the plaintiff.

[48] I am of the view that taking into account of what had happened and the conduct of the defendants as abovementioned, there is a real risk that the defendants are likely to come back to harass and/or disturb the plaintiffs pending the arbitration proceedings if a restraining order is not granted. The plaintiffs are justified of being fearful for their safety.

[49] The seriousness of the matter can be seen from what had been captured in exh. B4 of encl. 5 together with the pictures taken. That meeting was the starting point of the whole harassment episode. There have been sworn evidence from two persons as to what was said by the third defendant on that date. Compared to the evidence of the defendants which are only a bare denial as to what happened, the plaintiffs have successfully shown that there are real risks involved and the fear is far from being imaginary.

[50] The defendants have also gone to the second plaintiff's house together with four other persons whereby these were shown by photographs which the plaintiffs have annexed in their affidavits. The second plaintiff alleged that the defendants came and attacked the bodyguards and yet at the same breath the defendants say that everything was done diplomatically and peacefully. Why the need to go with so many persons if the intention is not to harass. After all, the dispute is already to be put before arbitration.

[51] Therefore an interim order is necessary to restrain the defendants from continuous harassment and disturbance pending the disposal of the main suit and the arbitration proceedings.

[52] As far as balance of convenience is concerned, I am of the view that the defendants would not be prejudiced by the restraining order as they would only have to distance themselves from the plaintiff pending the disposal of this suit. In any event it would not prejudiced the defendants if they are not privy to any of the alleged threats and harassment, if the injunction is granted.

[53] The defendants submitted that granting the injunction would have the effect of damaging the defendants' goodwill and reputation. The defendants are currently engaged in local and international clients so any injunction order will adversely affect the business of the defendants and any damages would not constitute an adequate remedy.

[54] The defendants further submitted that in the business sense, it is absurd to prevent the defendants from contacting the plaintiffs at all. Although the arbitration proceedings have been initiated, there are no guarantees that the disputes will be resolved in any time soon. Thus the defendants submitted that it makes more business sense to have the disputes settled earliest possible and this will not take place if the defendants are prohibited from contacting the plaintiffs.

[55] I cannot see how a prohibitory injunction which restrains the defendants to distance itself from the plaintiff would have any effect on the defendants' reputation.

[56] On the issue of the likelihood the matter cannot be settled earliest possible because of the presence of the restraining order preventing the defendants from contacting the plaintiff, it is expressly stipulated in the injunction order that the parties can

meet for purposes of arbitration. In any event, both parties are represented by lawyers and any communication can be done through the lawyers. There is no necessity for the defendants to approach the plaintiffs at any of the first plaintiff's agent's house to settle the disputes.

[57] It is to be noted that the ambit of the prayers sought for is only limited to 500 meters distance and also pending the disposal of these proceedings and the arbitration proceedings. This however does not apply to court attendance or attendance for arbitration proceedings.

[58] Hence the defendants' concern on this issue is unfounded.

[59] The defendants also brought up the issue that the prayers sought by the plaintiff in this application are impossible to be fulfilled and not practical. The first defendant is a company and cannot move physically or make telephone calls. The prayer is also meaningless to the first plaintiff that being a company, the first plaintiff cannot feel threatened.

[60] With respect to the defendants, companies are entities which cannot act on its own. It usually act *via* its agents/servants/employees. The order would be worded against the first plaintiff or/and its servants/employees/agents.

[61] Finally, damages is not an adequate remedy as the plaintiffs would not be adequately compensated for any physical harm or mental anguish which they may have to endure pending the determination of this suit.

[62] Therefore based on the abovementioned the application by the plaintiff in encl. 4 prayers 1-3 is allowed with costs of RM7,000.